

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. WEBB and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

*Docket No. 03-2098; Submitted on the Record;
Issued November 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$1,066.07 overpayment of compensation for the period of April 20 through May 17, 2003; and (2) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 4 weeks.

On December 19, 1995 appellant, then a 58-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an injury to his left shoulder from overuse in the performance of his federal duties. The claim was accepted by the Office for a torn rotator cuff. Appellant had rotator cuff surgery on December 28, 1995. On November 6, 2002 he filed a notice of recurrence. On February 13, 2003 appellant underwent arthroscopic surgery on his left shoulder. In a February 25, 2003 decision, the Office accepted his claim for rupture of the left tendon in his shoulder and rotator cuff surgery.

Appellant returned to work full time on May 5, 2003. On May 28, 2003 the Office provided him with a preliminary notice that he received a \$1,066.07 overpayment finding that he received disability compensation through May 17, 2003 when he was not entitled to compensation after he returned to work full time on May 5, 2003. Appellant requested a waiver of the overpayment noting that he was not aware that he was not to cash the check. A telephone conference hearing was held on July 22, 2003 regarding issues of fault and appellant's income and expenses. At the hearing he once again reiterated that he was not aware that he was not to cash the check and that he was originally not to return to work until May 26, 2003 but he was called back early. Regarding his submitted expenses appellant indicated that he did not include a monthly Office of Personnel Management (OPM) retirement check because he had not been notified that he was to receive it. Appellant also indicated and submitted supporting documentation that his monthly expenses totaled \$5,595.04. His monthly income, including the

OPM retirement benefits, was \$5,634.00 leaving after expense income of \$38.96. Appellant and his wife also had \$5,300.00 in assets.¹

In an August 11, 2003 decision, the Office found that appellant was not at fault for creating the overpayment as it was the result of an administrative error in the Office. However, his request for a waiver was denied as appellant had assets of \$5,300.00. Finally appellant was instructed to repay \$200.00 every four weeks.

The Board finds that appellant received a \$1,066.07 overpayment of compensation for the period April 20 through May 17, 2003.

In the present case, appellant received full compensation for the period April 20 through May 17, 2003 despite that fact that he was not entitled to full compensation for this period. The record contains evidence which shows that he received \$2,296.16 in compensation for the period when he was only entitled to receive \$1,230.09. Therefore, the Office properly determined that appellant received a \$1,066.07 overpayment.

The Board further finds that the Office properly denied waiver of the overpayment. The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.² These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."³ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁴

¹ Appellant indicated that there was a total of two people in his household.

² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³ 5 U.S.C. § 8129(b).

⁴ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁵ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁶

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both, that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. His monthly income exceeds his monthly ordinary and necessary expenses by approximately \$38.96 so appellant meets the first prong of the two part test; that current income exceeds his current ordinary and necessary living expenses by less than \$50.00. However, appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, *i.e.*, whether appellant's assets do not exceed the allowable resource base. Appellant listed his assets as \$5,300.00 while the threshold is \$5,000.00.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.⁷ Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 4 weeks.

⁵ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

⁶ 20 C.F.R. § 10.323.

⁷ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”⁸

The record supports that, in requiring repayment of the overpayment by deducting \$200.00 from appellant’s compensation payments every 4 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting from appellant’s compensation payments every four weeks.

The August 11, 2003 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
November 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ 20 C.F.R. § 10.321(a). *See Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).